[HIGH COURT OF AUSTRALIA.]

WYATT AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS AND DEFENDANTS,

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED AND OTHERS . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 11, 12, 26.

Barton A.C.J., Isaacs and Rich JJ.

Will—Codicil—Construction—Gift over—Death without leaving issue—Period of death.

A testator by his will bequeathed his residuary estate to his trustees for sale and conversion and to divide the proceeds among his named children, and directed that "in the event of the death of any of my said children without leaving lawful issue him or her surviving then his or her respective share be divided amongst his or her brothers and sisters respectively." By a codicil he gave the trustees power to postpone the sale and conversion and declared that the postponement should not affect the ultimate destination of the unconverted portion, and that the same should be treated as if converted immediately after his death.

Held, on the language of the will and codicil, that in the will the word "death" meant death before the arrival of the time when the residuary estate had been realized and the proceeds were ready for distribution, and that that period was by the codicil brought back to the date of the death of the testator.

Held, therefore, that on the death of the testator the residuary estate became indefeasibly vested in his children, who all survived him.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Wyatt* v. *Wyatt*, 16 S.R. (N.S.W.), 455, reversed.

APPEAL from the Supreme Court of New South Wales.

Joseph Wyatt died on 16th August 1896, having made his will, dated 20th August 1890, and a codicil thereto, dated 27th July 1892.

The will, so far as is material, was as follows :—" I give devise and bequeath my freehold messuage and premises situate at Lavender Bay aforesaid " (known as " Ellerslie ") " together with the household furniture goods and chattels in and about the same to my said trustees in trust to permit my wife Eleanor Dorothy Wyatt and any of my children so long as they remain unmarried to use occupy and enjoy the same during the life of my said wife free of all payments in respect of rent taxes insurance or otherwise chargeable on the said premises but if my said wife should after my decease prefer to reside elsewhere then and in such case I empower my said trustees with my wife's consent to let and demise the said messuage and direct that the rent to be derived therefrom shall be received by my said wife and her receipt shall be sufficient discharge therefor And immediately upon the decease of my said wife I direct my said trustees to sell and convert into money the said freehold hereditaments furniture and premises either by public auction or private contract as shall be thought best . . . And I direct that my said trustees shall stand possessed of the moneys to be produced by such sale or sales in the first place in the payment and satisfaction of the costs and expenses of and incidental to the execution of the trusts hereby reposed And I declare that the residue of the moneys so arising shall be held by them in trust to divide the same equally between all my children who shall survive my said wife and the issue of such as shall have predeceased her such issue to take per stirpes and not per capita And as to all my residuary real and personal estate of what nature or kind soever and wheresoever situate of or to which I may be at the time of my death seised possessed or entitled in any manner howsoever whether in possession reversion remainder or expectancy I give devise and bequeath the same unto and to the use of my said trustees upon trust with all convenient speed after my decease to sell call in and convert into money such parts thereof as shall not consist of ready money and to stand possessed of the proceeds of such sale and conversion and of such ready money as aforesaid upon trust to divide the same among my five children namely my two sons Sydney Joseph James Wyatt and Edwin Charles Wyatt and my three daughters Fanny Caroline Wyatt Mary Dorothy Wyatt and Edith Amanda Eliza

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Wyatt in such manner that the share taken by each of my said sons respectively shall exceed by five pounds per centum the share taken by each of my said daughters respectively and in the event of the death of any of my said childen without leaving lawful issue him or her surviving then his or her respective share be divided amongst his or her brothers and sisters respectively And I hereby direct and declare that in the event of any one of my said children electing to sell his or her respective share of and in my residuary estate under this my will that it shall be only lawful for him or her to sell the same share to some other one of my said children I direct that any sale made by my said trustees may be by public auction or private contract and subject to such terms and conditions and generally in such manner as they my said trustees shall in their discretion deem meet but so that the best price shall be obtained at any such sale or sales as aforesaid and so that the written consent of every member of my family interested in such sale shall be first obtained I hereby declare that the share of any female under this my will shall be held by her for her sole and separate use free from the debts control interference or engagements of her then present or any future husband and her receipts alone to be sufficient discharges to my said trustees but no such female shall have power to anticipate her said share or any portion thereof."

The codicil was, so far as is material, in the following terms :— " Whereas I am desirous of amplifying the powers given to my trustees and making certain alterations in my will now I direct that my trustees shall have anything in my said will to the contrary notwithstanding full power and authority to sell in manner therein provided my freehold property and appurtenances at Lavender Bay during the lifetime of my wife (but with her consent) if it shall be thought advisable And in such case I direct that the net proceeds arising from such sale shall be held by my trustees upon trust to invest the same in manner hereinafter provided and upon further trust to pay the income to arise therefrom to my wife during her life in lieu of the rent of such property in the event of the same being merely let and at the death of my wife upon trust to divide the same between all my children share and share alike And as to the residue of my real and personal estate I empower my trustees

to postpone for such period as they shall think fit the sale and conversion of any part or parts thereof directed by my said will to be sold and converted and I declare that the postponement of any such sale or conversion shall not affect the ultimate destination of such unconverted portion and the same shall be treated as if converted immediately after my death And whereas by my said will I have directed that my trustees shall stand possessed of such residue upon trust for my children in the shares and proportions therein mentioned now I revoke such direction and direct that instead thereof my trustees shall stand possessed of such residue upon trust to divide the same equally between and amongst all my children share and share alike And I further declare that all moneys to be invested under this my will may be invested in or upon real or leasehold securities being held for a term whereof sixty years at the least shall be unexpired at the time of such investment . . . And in addition to the above modes of investment I hereby authorize and empower my trustees or trustee at their or his discretion to invest any moneys under this my will in the purchase of real estate in the Colony of New South Wales or on fixed deposit in any long established bank in the said Colony or in any of the modes of investment authorized by Statute in this behalf."

The testator left him surviving his widow and the five children named in the will, and no children had predeceased him. The widow died on 13th September 1915, and the testator's son Sydney Joseph James Wyatt died on 21st March 1912 leaving two infant children him surviving.

An originating summons was taken out by Edwin Charles Wyatt, the surviving executor and trustee, for the determining of several questions including the following: "(4) Whether the residuary real and personal estate became on the death of the testator indefeasibly vested in the testator's five children." The defendants were the three daughters of the testator, the Perpetual Trustee Co. Ltd. (administrators of the estate of Sydney Joseph James Wyatt), and the two infant children of Sydney Joseph James Wyatt.

The originating summons was heard by *Harvey* J., who answered the question in the negative: *Wyatt* v. *Wyatt* (1).

(1) 16 S.R. (N.S.W.), 455.

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From that decision the plaintiff and his three sisters appealed to the High Court.

Leverrier K.C. (with him *R. K. Manning*), for the appellants. Although, in the case of an executory gift over in the event of the death without issue of certain beneficiaries, the term "death without issue" *primâ facie* means death at any time (*O'Mahoney* v. *Burdett* (1)), yet that meaning will not be given if the testator has indicated a contrary intention. Here the testator has indicated the intention that the term means death during his lifetime. The fact that an immediate distribution is directed has great weight in arriving at that conclusion (*Olivant* v. *Wright* (2); *In re Roberts*; *Roberts* v. *Morgan* (3); *Besant* v. *Cox* (4)).

Clive Teece, for the respondent Company. The onus is upon the appellants to establish their contention (*O'Mahoney* v. *Burdett* (1)), and there is nothing to support it. The fact that a distribution is directed is not sufficient to displace the ordinary and natural meaning of the words "death without issue" (*Allen* v. *Farthing* (5); *Gosling* v. *Townshend* (6); *Bowers* v. *Bowers* (7)).

[Counsel also referred to *Duffill* v. *Duffill* (8); *Clarke* v. *Henry* (9).]

[ISAACS J. referred to *In re Luddy*; *Peard* v. *Morton* (10); *Minors* v. *Battison* (11).]

Leverrier K.C., in reply.

Cur. adv. vult.

April 26.

BARTON A.C.J. In this case I have considered the judgment which is about to be read by my brother *Isaacs*, and, as I agree with the conclusion and the reasons for it, there is no need for me to deliver a separate judgment. In my opinion the appeal should be allowed and the fourth question should be answered in the affirmative.

(1) L.R. 7 H.L., 388.
(2) 1 Ch. D., 346.
(3) (1916) 2 Ch., 42.
(4) 6 Ch. D., 604.
(5) Jarman on Wills, 6th ed., p. 2160.
(6) 17 Beav., 245; 2 W.R., 23.
(7) L.R. 5 Ch., 244.
(8) (1903) A.C., 491.
(9) L.R. 6 Ch., 588.
(10) 25 Ch. D., 394.
(11) 1 App. Cas., 428, at p. 451.

ISAACS J. read the following judgment :—In this will there are no technical expressions, and there is no canon of construction to be applied except the fundamental rule that a man's testamentary intentions must be judged of by the words he uses, having regard to the subject matter. His untechnical words must receive their ordinary natural meaning, unless he himself has in some way indicated a special meaning. Apart from that, there is only one legal principle to bear in mind, and that is that in case of doubt the Court leans to an early indefeasible vesting, where not inconsistent with the natural meaning of words. That is not an arbitrary principle: it is only applying what the Court assumes is natural in the mind of a testator—to have as much certainty about his dispositions as is consistent with his expressed wishes.

Harvey J. said he felt great doubt; and the language of this will is such as to occasion it. Reading it, unembarrassed by any prior decisions on other wills, which, however similar, have important points of difference, its meaning, so far as the present case is concerned, appears to be this: The testator directed his residuary estate to be turned into money so far as it did not already consist of money, and then that the trustees should forthwith divide it among his five children, so that each son's "share" of the proceeds be five per cent. more than a daughter's share, and if when the moment for actual division came any child had died without issue, his or her "share," that is, share, not of residuary estate unconverted but of the "proceeds" after conversion, should be "divided" among the others. It is clear that the word "divided" in this latter event means divided by the trustees. It follows that the respondents' contention involves the retention of the corpus of each child's share in the hands of the trustees until, at all events, the death of all the children but one. It may involve that retention until the death of the survivor. It involves, further, that though the residue (other than ready money), however invested by the testator, must be converted into money and "divided," and, notwithstanding that no direction is given to invest it, yet it must be invested, and the income only paid to the children until they die. It is to be observed that when by the codicil an express permission is given to sell "Ellerslie" and hold the proceeds, directions are given

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Isaacs J.

as to investment of them. Then arises, if the respondents' contention be correct, a very complicated question as to the residue: Does the expression " brothers and sisters " in the divesting clause mean " surviving brothers and sisters " ? If it does, the clause cannot apply to the death of the survivor. If it does not, then, as each one dies without issue after the first, the estate of the first receives an accrual share out of the original share of the last one deceased. Then the testator in the next clause assumed to prohibit each of his children from selling his or her " share of and in the residuary estate," except to another of the children. That must have meant before realization. It could not reasonably mean a sale of so many sovereigns. But the change from " share " of proceeds to " share in residuary estate " is important, and has a practical value by reason of the next following provision in the will. That provision requires " the written consent of every member of my family interested " to be first obtained before the trustees sell any of the residuary estate. We are not concerned with the legal validity of this prohibitory provision, but with the intention of the testator, and he clearly intended to prohibit every one of his children from selling his " share in the residuary estate " except to another child. The last survivor would, on a literal reading, be forbidden to sell at all. If that be not so—and it is a violent construction—then some limit of time must be sought for the duration of the prohibition.

By the will, reasonably read as a whole, therefore, apart from the codicil, the gift over arises in this way :—The testator contemplated the arrival of the moment when the residuary estate had been realized, and the proceeds ready for distribution. If all the children were alive, they shared as directed. If any child had died leaving issue, then the *Wills, Probate and Administration Act* 1898, sec. 29, applied. But if any child had died without issue, then the share that would have gone to that child was to be divided among the rest. The division was to be absolute. The provision as to separate use and the expression " discharges to my said trustees " are consistent with this, because a female might be married both when " Ellerslie " proceeds were divided and when the residuary proceeds were divided, and the trustees would require her personal discharge as to each. This view is confirmed by the codicil, which

appears to regard the division as the " ultimate destination " of the residue.

The death of a child without issue means, then, in this will, the death without issue either before the testator's death or at any time thereafter consistent with the other provisions of the will, which, however, apart from the codicil, placed the limit of actual division of the proceeds upon the possible period. The testator apparently saw some possible difficulty in adhering to the moment of actual division, and so by his codicil carried back the operative time of distribution to the moment of his death. But that only carried back with it the operation of the divesting clause. Apparently he wanted finality according to the state of affairs then.

Holding this view, which is opposed to the decision of *Harvey* J. on this point, the only one appealed against, I am of opinion that the appeal should be allowed.

RICH J. I concur.

Appeal allowed. Order appealed from discharged except as to costs. Question No. 4 answered in the affirmative. Costs of all parties of this appeal allowed as between solicitor and client out of the residuary estate.

Solicitor, *R. G. C. Roberts.*

B. L.